I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE CLAIMED CONSTITUTIONAL QUESTION IS WITHOUT SUBSTANCE.

Defendants' purported Constitutional issue is without substance — a factor which may explain its belated appearance in this case at a time when other points have been exhausted. The Appellate Court has only indicated that where a witness is adverse within the meaning of Section 60 of the Practice Act, his testimony is properly given the weight to which it may be entitled and that such evidence may be considered against all defendants. Nothing in such a holding suggests that there is any invidious distinction being made which amounts to a deprivation of equal protection of law. If the witness is adverse (as he must be if the statute applies) then his testimony can, practically speaking, be elicited only if he may be interrogated as though on cross examination. Once that testimony has been properly elicited, it is entitled to as much weight as that of any other witness whether elicited through cross or direct examination. To so hold does not amount to an unequal treatment of litigants but to a consistent and practical accommodation of the rules of evidence to the problems of multiple party litigation. See *Edwards* v. *Martin,* 2 Ill. App.2d 34, 117 N.E.2d 864 (3d Dist. 1954); *Day* v. *Ukena,* 351 Ill.App. 26, 113 N.E.2d 574 (3d Dist. 1953); *Smith* v. *Murphy,* 384 Ill. 34, 40-41, 50 N.E.2d 844 (1943); *Kough* v. *Hoehler,* 413 Ill. 409, 109 N.E.2d 177 (1952) and *McInnis* v. *Shapiro,* 293 F.Supp. 327 (N.D. Ill. 1968) affirmed, 394 U.S. 322 (1969). Notwithstanding defendants' claims to the contrary, there is nothing inherently unfair or arbitrary in holding that evidence given in response to a valid and proper exami-

nation under Section 60 of the Practice Act should be admissible against all parties defendant.

II.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO SHOWING THAT THE POINT WAS PROPERLY RAISED IN THE TRIAL COURT.

Defendants have for the first time on appeal sought to raise a Constitutional question claiming that Section 60 of the Civil Practice Act, as construed by the Appellate Court, deprives them of equal protection of the laws. Defendants did not raise this point until their petition for rehearing in the Appellate Court though the facts on which the argument was based were as apparent at trial and on appeal to the Appellate Court as now. The claim that this question has just arisen is false. Under such circumstances defendants are precluded from raising a Constitutional point at this eleventh hour. *People* v. *Brand,* 415 Ill. 329, 233-34, 114 N.E.2d 370 (1953), *cert. den.,* 374 U.S. 959; *Myers* v. *Myers,* 404 Ill. 606, 609, 90 N.E.2d 186 (1950); *Adams* v. *Board of Education,* 415 Ill. 227, 112 N.E.2d 473 (1953).

In *People* v. *Brand,* 415 Ill. 329, 114 N.E.2d 370 (1953) the Court stated the rule in language which is clearly applicable here:

> ". . . It is a fundamental that the question of the constitutionality of a statute cannot be properly raised for the first time in a court of review, but must have been presented to the trial court and ruled upon by it, and the person challenging its validity must have preserved proper exceptions to such ruling. * * * It is a rule of universal application that the reversal of a judgment cannot be urged

> upon a ground not submitted to the trial court and upon which it did not and was not asked to decide. * * *" 415 Ill. at 337. (Citations omitted.)

Certainly the Supreme Court of the United States should not be called upon to pass upon a constitutional question involving the construction of the Illinois Civil Practice Act which was never properly presented to the Illinois Courts.

Apart from the insubstantiality of the question itself, it seems clear that this question lacks the importance which would justify a review by the Supreme Court of the United States. No conflicting decisions have been cited and no showing has been made that the issue is sufficiently urgent to require this Court to act. The point is at best obscure. It concerns a question of civil trial procedure and evidence that his already been amply considered by the Illinois Supreme Court.

CONCLUSION

Plaintiff respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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